82-76

No.

Office - Supreme Court, U.S.
FILED
JUL 18 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

PHILIP S. SHAPIRO,

Petitioner,

versus

HON. LAWRENCE COOKE, Chief Judge, HON. MATTHEW I. JASEN, HON. DOMENICK GABRIELLI, HON. HUGH R. JONES, HON. SOL WACHTLER, HON. JACOB D. FUCHSBERG, HON. BERNARD S. MEYER, Associate Judges, as the Court of Appeals of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

PHILIP S. SHAPIRO
Petitioner Pro Se
47 Peyster Street
Albany, NY 12208
(518) 482-4313

THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7161—1982

(5809)

Questions Presented.

There are two questions presented for review:

A. Did the Respondents violate the due process and equal protection rights of a Maryland-licensed attorney employed by the State of New York in refusing to recognize his New York legal experience (although not refusing to recognize his identical Maryland experience) for the purpose of qualifying the attorney for admission to the New York bar on motion, when similar service of New York State-employed attorneys has been accepted for this purpose?

B. Did the Respondents violate a Maryland-licensed attorney's Constitutional right to travel in refusing to recognize his New York State government legal experience for the purpose of qualifying the attorney for admission to the New York bar on motion?

Parties.

The parties to this cause are those whose names appear in the caption above.

Table of Contents.

	Page
Questions Presented	i
Parties	i
Table of Contents and Table of Authorities	ii
Opinions Below	1
Jurisdiction	2
Constitutional Provisions, Statutes, and Court Rules Addressed	2
Statement of the Case	3
A. The Petitioner	3
B. The State-of-Admission Practice Rule and the Arbitrary Pattern of its Application	5
C. Constitutional law questions raised below	8
ARGUMENT:	
A. Did the Respondents violate the due process and equal protection rights of a Maryland-licensed attorney employed by the State of New York in refusing to recognize his New York legal experience (although not refusing to recognize his identical Maryland experience) for the purpose of qualifying the attorney for admission to the New York bar on motion, when similar service of New York State-employed attorneys has been accepted for this purpose?	9

Page

Due Process..... 10

Equal Protection..... 13

B. Did the Respondents violate a Maryland-licensed attorney's Constitutional right to travel in refusing to recognize his New York State government legal experience for the purpose of qualifying the attorney for admission to the New York bar on motion?..... 15

Reasons for Granting the Writ..... 17

Prayer for Relief..... 18

Index to Appendix.

Page

Letter, dated April 20, 1982, Denying the Petitioner's Request for Reconsideration.... A1

Letter, dated March 23, 1982, Denying the Petitioner's Request for a Determination that his Legal Experience Qualified Him for Admission on Motion..... A2

Letter, dated January 13, 1982, Denying Request by William J. Cowan, Esq. for a Determination that his Legal Experience Qualified Him for Admission on Motion [Subsequently Reversed] A3

Page

Letter, dated July 18, 1980, Denying Request by David A. Schlissel, Esq. for a Determination that his Legal Experience Qualified Him for Admission on Motion..... A4

Order, dated July 12, 1979, Determining that the Legal Experience of Robert D. Reed, Esq. Qualified Him for Admission on Motion.... A5

New York Judiciary Law §90 (1)(b)..... A7

New York Code of Rules and Regulations, Title 22, §§ 520.9 (a) and 520.12..... A8

Annotated Code of Maryland, Public Service Commission Law, Article 78, §15 (a) and (d)..... A11

New York Executive Law §553 (2)(c) and(3)(d) and (e)..... A12

TABLE OF AUTHORITIES.

Page

CONSTITUTIONAL PROVISIONS:

United States Constitution:

Article I, Section 8, Clause 3..... 2, 14-15

Article IV, Section 2, Clause 1..... 3, 8-9, 14-15

Amendment XIV, Section 1..... 3, 14-153

Articles of Confederation:

Article IV..... 16

Page

STATUTES:

Annotated Code of Maryland, Article 78, §15(a) and (d) 4

New York Executive Law §553 (2) (c) and (3) (d) and (e) 4

New York Judiciary Law §90 (1) (b)..... 3

United States Code, Title 28, §1257(c)..... 2

COURT RULES:

New York Code of Rules and Regulations, Title 22, §§ 520.9(a) and 520.12..... 3, 5-8

JUDICIAL DECISIONS:

Baldwin v. Fish and Game Commission of Montana, 436 U. S. 371, 379-80, 98 S. Ct. 1852, 1858, 56 L. Ed. 2d 354 (1978)..... 16

Corfield v. Coryell, 6 F. Cas. 546, 552 (No. 3, 230) (CC E. D. Pa. 1823)..... 15

Goldsmith v. United States Board of Tax Appeals, 270 U. S. 117, 123, 46 S. Ct. 215, 70 L. Ed. 494 (1926)..... 10, 12

Gordon v. Committee on Character and Fitness, 48 N. Y. 2d 266, 422 N. Y. S. 2d 641 (1979).. 8

Gypsy Oil Co. v. Escoe, 275 U. S. 498, 48 S. Ct. 112, 72 L. Ed. 393 (1927)..... 2

Page

Hicklin v. Orbeck, 437 U. S. 518, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978)..... 16

In re Garland, 71 U. S. 366, 370 (1867)..... 12

In re Lockwood, 154 U. S. 116 (1894)..... 10

In re Summers, 325 U. S. 561, 565-569 (1945)..... 2

Konigsberg v. State Bar of California, 353 U. S. 252, 77 S. Ct. 722, 1 L. Ed. 2d 810 (1957)..... 10, 12

People v. Black, 156 Misc. 516, 282 N. Y. S. 197, 200 (1935)..... 17

Schware v. Board of Bar Examiners, 353 U. S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957)..... 9, 12-13

Shaikh v. Appellate Division, 39 N. Y. 2d 676, 350 N. E. 2d 902, 385 N. Y. S. 2d 514, 517 (1976) 12

State v. Wells, 191 S. C. 468, 5 S. E. 2d 181, 186 (1939)..... 11, 17

Toomer v. Witsell, 334 U. S. 385, 398, 68 S. Ct. 1156, 1163, 92 L. Ed. 1460 (1948)..... 14

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220, 6 S. Ct. 1064..... 10, 13

Zobel v. Williams, ___ U. S. ___, ___ S. Ct. ___, 50 LW 4613, 4616-4617 (1982)..... 16

Page

LAW REVIEW ARTICLES:

Smith, "Time for a National Practice of Law Act," 64 ABA Journal 557..... 17

Note, "A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV," 92 Harvard Law Review 1461, 1472-1473 (1979)..... 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

PHILIP S. SHAPIRO,

Petitioner,

versus

HON. LAWRENCE COOKE, Chief Judge, HON. MATTHEW J. JASEN, HON. DOMENICK GABRIELLI, HON. HUGH R. JONES, HON. SOL WACHTLER, HON. JACOB D. FUCHSBERG, HON. BERNARD S. MEYER, Associate Judges, as the Court of Appeals of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Opinions Below.

After practicing public utility law for the Maryland state government for three years, the Petitioner was recruited to

perform identical service for the New York State government. After two years of service for New York, the Petitioner requested the Respondents to determine that his five years of legal practice qualified the Petitioner for admission on motion to the New York bar. By letter dated March 23, 1982, the Petitioner was notified that his request was denied because two of said five years of practice were performed for a New York State agency (appendix, p. A2). Petitioner then requested reconsideration of this denial. By letter dated April 20, 1982, the Petitioner was notified that his request for reconsideration had been summarily denied (appendix, p. A1).

Jurisdiction.

The determination of New York State's highest court on the merits of the Petitioner's qualification for admission to the New York bar on motion is a final judgment reviewable by writ of certiorari. *In re Summers*, 325 U. S. 561, 565-569 (1945). Jurisdiction to review said determination by writ of certiorari is conferred upon this Court by 28 U. S. C. §1257(c). A petition for writ of certiorari in such proceedings must be brought within ninety days of the April 20, 1982 denial of the request for reconsideration. *Gypsy Oil Co. v. Escoe*, 275 U. S. 498, 48 S. Ct. 112, 72 L. Ed. 393 (1927).

Constitutional Provisions, Statutes, and Court Rules Addressed.

The following provisions of the United States Constitution are involved in this case:

Article I, Section 8, Clause 3.

> The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . .

Article IV, Section 2, Clause 1.

> Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Amendment XIV, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Admission of attorneys on motion is governed by Sections (hereinafter referred to as Rules) 520.9 (a) and 520.12, Title 22, New York Code of Rules and Regulations, promulgated by the Respondents pursuant to Section 90(1)(b) of the New York *Judiciary Law*. The text of these provisions appears at appendix pages A7-A10.

Statement of the Case.

A. The Petitioner.

The Petitioner was a citizen and resident of the State of Maryland from birth until January, 1980, at which time he

became and since which time he has remained a citizen and resident of the State of New York. After graduating from the University of Maryland School of Law and passing the Maryland general bar examination, the Petitioner was admitted to the Maryland bar on December 30, 1976.

Upon his admission to the bar, the Petitioner was appointed an Assistant People's Counsel to the Maryland Public Service Commission. His duties as an Assistant People's Counsel were as follows: to appear on behalf of utility consumers before State and Federal utility regulatory commissions, to prosecute and defend judicial causes relating to utility matters, and to serve as legislative counsel to his agency. In September, 1979, he was recruited by the New York State government to serve as an Intervenor Attorney, with responsibilities identical to those of a Maryland Assistant People's Counsel (compare: *Annotated Code of Maryland, Public Service Commission Law,* Article 78, §15 [a] and [d], with New York *Executive Law* §553 [2] [c] and [3] [d] and [e], appendix pp. A11-A12).

The recruitment of out-of-state attorneys experienced in utility regulation is a common practice,* particularly in New York State. At the time of the Petitioner's recruitment by the Utility Intervention Unit of the State's Consumer Protection Board, half of the Unit's attorneys were admitted only in other jurisdictions. The State's Public Service Commission has similarly recruited a large number

---

*While public utility law is a comparatively narrow area of specialization, its substance varies little from state to state and its practitioners often migrate to other states to pursue their calling. In order to increase his employment opportunities, the Petitioner, in 1977, secured bar admissions, upon examination, in the States of Florida and California and, upon motion, in the District of Columbia.

of out-of-state attorneys, particularly former employees of the Federal Power Commission (now the Federal Energy Regulatory Commission). The New York Attorney General also recruits out-of-state utility regulatory attorneys.

B. The State-of-Admission Practice Rule and the Arbitrary Pattern of its Application.

Pursuant to Respondents' Rule 520.9(a) (appendix, p. A8), an attorney having five years of legal practice may be admitted to the New York bar without examination. Such practice must occur in the attorney's state of admission (hereinafter referred to as the "State-of-Admission Practice Rule"), unless:

(a) performed in the employ of the Federal Government;

(b) performed as a law school professor; or

(c) the Respondents waive the State-of-Admission Practice Rule pursuant to Rule 520.12.

Upon information and belief, the first modern-era State-employed utility regulatory attorney who requested waiver of the State-of-Admission Practice Rule, as allowed by Rule 520.12 (then Rule 520.10), was Robert Reed, Esq. After practicing law for less than one year in his state of admission, Colorado, Mr. Reed became a hearing officer at the State Public Service Commission. In 1979, Mr. Reed petitioned the Respondents to determine that his service in and for the State of New York, when combined with his Colorado practice, be accepted as five years of law practice for the purpose of qualifying Mr. Reed for admission on motion. On July 12, 1979, the Respondents granted

Mr. Reed's petition for waiver (Reed waiver) (appendix, p. A5).

The Reed waiver was well known in the community of utility regulatory attorneys employed by the State of New York and the Petitioner learned of the Reed waiver when he was recruited by the State in the fall of 1979. The Petitioner's agreement to accept the New York position, effective January 14, 1980, relied upon the belief that the Respondents would regard the Petitioner's service in a similar manner.

In July, 1980, a second State-employed utility regulatory attorney, David A. Schlissel, Esq., requested waiver of the State-of-Admission Practice Rule so that his service as an Intervenor Attorney for the Consumer Protection Board, when combined with his 23 months of legal service in his state of admission, would be accepted for the purpose of qualifying for admission to the New York bar on motion. At the time of his request, however, Mr. Schlissel had already unsuccessfully taken the New York bar examination. The Respondents denied Mr. Schlissel's request (Schlissel denial). In a letter dated July 18, 1980, Mr. Schlissel was informed by the Respondents' Clerk that:

> [o]n the basis of your admission to practice in Georgia in 1973, your practice in Georgia for 23 months and your employment as a Utility Intervenor Attorney with the New York State Consumer Protection Board since December 1975, *you are qualified to file a petition for waiver* of strict compliance with the [State-of-Admission] practice requirement of 520.7(a) (2) [now Rule 520.9 (a) (2)]. However, I must advise you that it is the Court's

> opinion that the *practice of law in New York State for a state agency does not count as actual practice* for purposes of [qualifying for admission on motion]. (Emphasis supplied.) (Appendix, p. A4.)

Subsequently, a third State-employed utility regulatory attorney, William J. Cowan, Esq., requested waiver of the State-of-Admission Practice Rule so that his service for the State Public Service Commission, first as an opinion drafter and later as a hearing officer, when combined with less than one year of practice in Massachusetts, the state of his admission, would be accepted for the purpose of qualifying for admission to the New York bar on motion. Mr. Cowan's request was initially denied. In the denial letter, dated January 13, 1982, Mr. Cowan was informed that:

> Employment in New York State by the Public Service Commission, as an Administrative Law Judge and as Director of the Public Service Commission's Office of Opinions and Review is not actual practice in the contemplation of Rule 520.9 (a) (2) (i) (a). (Appendix, p. A3.)

Mr. Cowan then requested reconsideration of this determination, noting the Reed waiver. In late February, 1982, the respondents *reversed* their position and waived the State-of-Admission Practice Rule for Mr. Cowan (Cowan waiver).

On March 8, 1982, the Petitioner applied for waiver of the State-of-Admission Practice Rule so that his two years of service as an Intervenor Attorney, when combined with his three years of identical legal practice in Maryland, would be accepted for the purpose of qualifying the Petitioner for admission on motion. By a letter dated March 23, 1982, the Petitioner was informed that:

> Employment in New York State by the Consumer Protection Board as an Intervenor Attorney is not actual practice in contemplation of Rule 520.9 (a) (2) (i) (a). (Appendix, p. A2.)

The Petitioner thereupon requested reconsideration, noting that the Reed and Cowan waivers were granted to recognize service qualitatively equivalent to that of the Petitioner.*

C. Constitutional law questions raised below.

The Petitioner's request for reconsideration argued that the Respondents' action abridged the Petitioner's rights to equal protection and due process as well as his privileges and immunities as guaranteed by Article IV, §2, of the Federal Constitution.

The Petitioner explained that he moved from Maryland to New York for the specific purpose of practicing law and contrasted the Respondents' instant denial with their determination in *Gordon v. Committee on Character and Fitness* (1979), 48 N. Y. 2d 266, 422 N. Y. S. 2d 641, that barriers to the interstate migration of attorneys (there a

---

*Indeed, the Petitioner's legal experience arguably exceeded that of Messrs. Reed and Cowan inasmuch as an Intervenor Attorney must be an attorney and must participate in judicial proceedings as well as administrative ones. For example, as an Intervenor Attorney, the Petitioner has been admitted *pro hac vice* to appear before several New York courts, including the New York Court of Appeals, and has also appeared before the United States Court of Appeals for the District of Columbia Circuit. Administrative law judges and opinion drafters, on the other hand, do not appear in judicial proceedings. Moreover, while both Messrs. Reed and Cowan were credited for acquiring legal experience as administrative law judges, there is no requirement that such personnel be attorneys. Two current administrative law judges are trained only in the field of engineering.

residency requirement) violated the privileges and immunities clause of Article IV of the Federal Constitution.

In his letter transmitting the petition for reconsideration, the Petitioner also requested an opportunity to appear before the Respondents, either formally or informally, to explain the grounds upon which he believed his New York legal experience should be recognized for the purpose of qualifying him for admission to the New York bar on motion. By letter dated April 20, 1982, however, the Petitioner was notified, without explanation, that his petition for reconsideration had been summarily denied.

ARGUMENT.

A. Did the Respondents violate the due process and equal protection rights of a Maryland-licensed attorney employed by the State of New York in refusing to recognize his New York legal experience (although not refusing to recognize his identical Maryland experience) for the purpose of qualifying the attorney for admission to the New York bar on motion, when similar service of New York State-employed attorneys has been accepted for this purpose?

In *Schware v. Board of Bar Examiners*, 353 U. S. 232, 238-239, 77 S. Ct. 752, 1 L. Ed. 2d 796, 801-802 (1957), this Court established the following constitutional standards governing State bar admission practices:

> A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process Or Equal Protection Clause of the Fourteenth Amendment. [Citations omitted] A State can require high

> standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law . . . Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards or when their action is invidiously discriminatory. Cf. *Yick Wo v. Hopkins,* 118 U. S. 356, 30 L. Ed. 220, 6 S. Ct. 1064.

In the companion case of *Konigsberg v. State Bar of California,* 353 U. S. 252, 273, 77 S. Ct. 722, 1 L. Ed. 2d 810, 825, the Court added that while it is important to

> [leave] States free to select their own bars, . . . it is equally important that the State not exercise this power in an arbitrary or discriminatory manner . . .

Due process.

The Petitioner's five years of legal employment qualified the Petitioner for a determination that his legal experience was sufficient for admission to the New York bar without examination (see; Schlissel denial, appendix, p. A4). Being thus eligible under State law, cf. *In re Lockwood,* 154 U. S. 116 (1894), for a determination of qualification, the Petitioner was entitled to procedural due process, including the right to notice, hearing, and the right to present evidence. *Goldsmith v. United States Board of Tax Appeals,* 270 U. S. 117, 123, 46 S. Ct. 215, 70 L. Ed. 494 (1926). The Respondents, however, afforded the Petitioner neither a hearing nor an opinion

stating its grounds for invoking the State-of-Admission Practice Rule in this instance.

While the Respondents held that employment as an Intervenor Attorney is not actual practice of law for the purpose of qualifying for admission to the New York bar on motion, the Respondents do not deny that the Petitioner's service is the practice of law. The Respondents' policy is simply that "the practice of law . . . for a state agency does not count . . ."* (appendix, p. A4).

The Respondents' refusal to recognize the Petitioner's New York practice was not based upon a qualitative consideration of the Petitioner's legal experience but rather

*The Petitioner appears most frequently before the New York Public Service Commission. The State's Bar Association issued an advisory opinion in 1977 finding that a layman's representation of a party to a Public Service Commission proceeding constituted the (unauthorized) practice of law. New York State Bar Association Unlawful Practice of Law Committee (Committee), Advisory Opinion #39, issued April 19, 1977. In that opinion, the Committee based its conclusion upon the observation that Commission practice involved the

> preparation of pleadings, examination and cross-examination of witnesses and preparation of legal briefs and arguments (*id.*, p. 1).

The Committee, at length, adopted the following conclusion of the South Carolina Supreme Court as its own:

> Where the application of legal knowledge and technique is required, the activity constitutes such practice even if conducted before a so-called administrative board or commission. *It is the character of the act, and not the place where it is performed, which is the decisive factor.* [Emphasis in Bar Association's Opinion.] *State v. Wells*, 191 S. C. 468, 5 S. E. 2d 181, 185 (1939) (*id.*, p. 4).

upon his failure to practice in the "right" place. Seemingly, if he were employed by the State Public Service Commission rather than appearing before it, or if he had remained in Maryland practicing before that State's Public Service Commission for an additional two years, the Respondents would have recognized his practice for the purpose of his gaining admission on motion to the New York bar. Such distinctions are arbitrary and irrational and thus violative of both the due process and equal protection clauses. *Goldsmith, supra; Schware, supra; Konigsberg, supra.*

The right to practice law in a state is not a "matter of grace and favor" or "a mere indulgence," *In re Garland,* 71 U. S. 366, 370 (1867), but rather a necessary condition for the pursuit of a lawyer's livelihood. The Petitioner's request to qualify for admission on motion involved a fundamental property interest and should have been accorded the procedural safeguards of the Due Process Clause.

The State-of-Admission Practice Rule, here cited to discredit the Petitioner's New York service, is not related to an applicant's fitness of character, *see: Shaikh v. Appellate Division,* 39 N. Y. 2d 676, 350 N. E. 2d 902, 385 N. Y. S. 2d 514, 517 (1976), but only an applicant's legal knowledge.* The rule, however, is not rationally-related to that objective. Five years of legal service by an attorney in his state of admission is not likely to render that attorney proficient in laws peculiar to the State of New York. Indeed, since New York experience is rejected while out-of-state practice is not, the bar examination is waived for those applicants least familiar with the topics of New York law covered in the examination.

---

*The Respondents there held: "[E]ducational and legal qualification, . . . is a requirement separate and distinct from 'character and fitness.' " *Id.,* 385 N. Y. S. 2d at 517.

The arbitrary application of the State-of-Admission Practice Rule to discredit the Petitioner's New York practice precludes the Petitioner from qualifying for admission to the New York bar so long as he maintains his present position, since the Respondents have created an irrebutable presumption that the practice of law by an Intervenor Attorney is not the "actual practice in contemplation of Rule 520.9(a) (2) 1(a)" (appendix, p. A2).

The Petitioner has been denied the opportunity to qualify for admission to the New York bar on motion in a wholly arbitrary manner and upon considerations which offend the dictates of reason. The Respondents' action, therefore, violated the Petitioner's rights under the Due Process Clause of the Fourteenth Amendment. *Schware, supra,* 353 U. S. 232, 249, 251 (concurring opinion).

Equal protection.

The object of the equal protection clause is to guarantee that persons similarly situated shall be treated equally. *Yick Wo v. Hopkins, supra.* Nonetheless, distinctions among individuals are permitted under the Constitution if a state can show that the distinctions are rationally-related to furthering legitimate State interests. If fundamental rights are impaired by a classification, however, the state bears a heavy burden of justification.

The Respondents here have distinguished the practice of utility regulatory law while employed by the State Public Service Commission from the practice of utility regulatory law while employed by the State Consumer Protection Board for the purpose of granting admission to the New York bar without examination. Even under the "minimal rationality test," such a distinction among members of the

class of New York State-employed utility regulatory attorneys cannot stand.

The Respondents' action, however, should be subjected to strict scrutiny since the Petitioner, like Messrs. Reed and Cowan, has exercised his right to interstate travel to pursue his professional calling, a right protected by the Commerce Clause and the privileges and immunities clauses of Article IV and Amendment XIV of the Federal Constitution. See discussion, *infra*.

When a State's discrimination affects a fundamental right, the constitutionality of the discrimination is ascertained by the application of a two-part test. First, there must be a showing that the disfavored individual constituted "a peculiar source of evil" at which the action is aimed. *Toomer v. Witsell*, 324 U. S. 385, 398, 68 S. Ct. 1156, 1163, 92 L. Ed. 1460 (1948). Second, there must be a "reasonable relationship between the danger . . . and the . . . discrimination practiced . . . ." *Id.* 324 U. S., at 399.

The Petitioner's migration to the State of New York at the request (and expense) of the State of New York to work for the State of New York constituted no peculiar evil to the people or the State of New York; quite the contrary, the State's interest was enhanced by successfully attracting the Petitioner and other qualified practitioners from beyond its borders to join its civil service.

Assuming, *arguendo*, however, that the Petitioner's migration to New York posed a threat to the populace of the State, the most reasonable means of remedying the threat would have been for the State not to have recruited the Petitioner in the first place.

Furthermore, no vital State interest can possibly be served by admitting Messrs. Reed and Cowan on motion but subjecting the Petitioner to the expense, anxiety, and loss of employment occasioned by the rigors of preparing for a full bar examination. For these reasons, the Court should hold that the Respondent's discriminatory refusal to recognize the Petitioner's New York legal experience violated his right to the equal protection of the laws.

B. Did the Respondents violate a Maryland-licensed attorney's Constitutional right to travel in refusing to recognize his New York State government legal experience for the purpose of qualifying the attorney for admission to the New York bar on motion?

The Respondents' refusal to recognize the Petitioner's two years of New York legal experience penalizes the Petitioner for accepting New York State government employment at a time when he had only completed three years of practice in his native State. For this transgression, no matter how many years further the Petitioner remains an Intervenor Attorney, he will be disqualified from entering private practice in his adoptive State unless he successfuly takes a full bar examination or physically removes to and practices in a state of admission for an additional two years.

The right of a citizen of one state to travel to another state for the purpose of pursuing his professional calling on an equal footing with that state's own citizens is fundamental. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (No. 3,230) (CC E. D. Pa. 1823). This right has been held at times to derive from the privileges and immunities clause of Article IV, the Commerce Clause, and the privileges and immunities clause of the XIVth Amendment, *see:*

Zobel v. Williams, ____ U. S. ____, ____, 50 L. W. 4613, 4616-4617 (1982) (Brennan, J., concurring) and ____ U. S. ____, ____, 50 L. W. 4618-4620 (O'Connor, J., concurring). This right was also embodied in the fourth article of the Articles of Confederation. *See: Baldwin v. Fish and Game Commission of Montana*, 436 U. S. 371, 379-80, 98 S. Ct. 1852, 1858, 56 L. Ed. 2d 354 (1978).

While the right to travel is fundamental, it is not absolute. *Toomer v. Witsell, supra*, 334 U. S., at 396. A discrimination against citizens from other states will pass constitutional muster if it satisfies the two-pronged test discussed previously.

First, the discrimination must have a rational relationship to the peculiar evil occasioned by the presence of the disfavored non-citizen. If so, the discrimination actually practiced must be shown to be closely tailored to achieve its objective. *Hicklin v. Orbeck*, 437 U. S. 518, 528, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978).

In the instant case, it is unclear what evil Petitioner's service to the State of New York constituted to warrant rejection of that legal service for demonstrating legal knowledge. His New York practice, *per se*, presents no threat to the general public of New York, since the Petitioner's sole client is the State itself; and his New York legal experience, if anything, renders the Petitioner more familiar with New York law than attorneys admitted on motion who have had no contact with the State.

The Respondents' stated policy not to waive their State-of-Admission Practice Rule for a utility regulatory attorney or other attorneys practicing law for the State does not promote the State's interest and, as such, constitutes an unwarranted barrier to interstate travel.

Reasons for Granting Writ.

The objective of bar admission standards and penal laws prohibiting the unauthorized practice of law is to protect the public rather than the economic interest of the local bar. Cf. *State v. Wells,* 191 S. C. 468, 5 S. E. 2d 181, 186 (1939); *People v. Black,* 156 Misc. 516, 282 N. Y. S. 197, 200 (1935). Barriers to the admission of out-of-state attorneys, however, frequently promote no more than economic protectionism. *See:* Note, "A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV," 92 *Harvard Law Review,* 1461, 1472-1473 (1979). As former American Bar Association President Chesterfield Smith recently wrote:

> Many of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition. They have not undertaken to determine whether the out-of-state lawyer is better or worse than the resident lawyer or whether the standard for bar admission in the other state is higher or lower than their own.—"Time for a National Practice of Law Act," 64 *ABA Jour.* 557.

While the State-of-Admission Practice Rule, on its face, actually seems to favor certain non-residents (those having practiced in their states of admission) over residents, the practical effect is to discourage out-of-state attorneys from accepting New York-based employment opportunities until the completion of five years of service in their states of admission. In this effect, New York attorneys are given a competitive advantage for positions in both State government and in the private sector. The rule also has the

secondary effect of inhibiting recent out-of-state bar admittees from migrating to *any* other state to pursue interim employment opportunities (such as corporate transfers) if their career objective is practice law in New York.

New York's State-of-Admission Rule is not unique. Upon information and belief, counterpart regulations exist in the States of Illinois, Tennessee, Hawaii and New Mexico and may exist in other states.*

Such barriers, erected ostensibly in the public interest, needlessly discourage the interstate migration of duly-educated and licensed attorneys, particularly at a time of increasing uniformity of both state laws and state bar examinations.

Prayer for Relief.

WHEREFORE, the Petitioner prays that this Court:

1. Order a writ of certiorari to issue to the Court of Appeals of the State of New York to review the determination of the Respondents, communicated by a letter dated March 23, 1982, and the Respondents' refusal to reconsider said determination, communicated to the Petitioner by a letter dated April 20, 1982;

2. Reverse the determinations aforesaid and command the Respondents to enter an order that the Petitioner has sufficient legal experience to be admitted to the New York bar without examination;

---

*United States Law Week has reported that Federal district courts in Maryland and Michigan have declared unconstitutional state-of-admission practice requirements used to deny expedited bar admission to resident attorneys whose practice was not in their states of admission. 49 L.W. 2338 (1980) and 50 L.W. 2547 (1982). The opinions in those cases, however, were withdrawn, upon information and belief, when these restrictions were abolished.

3. Grant the Petitioner costs, and such other and further relief as the Court may deem just and proper.

Dated: Albany, New York
July 13, 1982

Respectfully submitted,

PHILIP S. SHAPIRO
Petitioner, *Pro Se*
47 Peyster Street
Albany, NY 12208
(518) 482-4313